

COMMONWEALTH OF VIRGINIA

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DELEGATE DANIEL MARSHALL, III, Vice-chair
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VIRGINIA HOUSING COMMISSION

SUMMARY

Virginia Housing Commission
September 17, 2014, 2:00 PM
Senate Room A, General Assembly Building

I. Call to Order

Senator Mamie Locke, Chair, called the meeting to order at 2:00 PM.

Members in attendance: Senator Mamie E. Locke, *Chair*; Delegate Daniel W. Marshall, III, *Vice-chair*; Senator George L. Barker; Senator John C. Watkins; Delegate David L. Bulova; Delegate Rosalyn R. Dance; Delegate Barry D. Knight; Delegate Christopher K. Peace; Mark K. Flynn, *Governor Appointee*; T.K. Somanath, *Governor Appointee*; and Laura D. Lafayette, *Governor Appointee*.

Staff: Elizabeth Palen, *Executive Director of VHC*

II. Proffers and Constitutional Rights

- **T. Preston Lloyd, Land Use Attorney, Williams Mullen, LLP:** Cash proffers are an alternative sources for funding public infrastructure that came out of an attempt to create better flexibility. This creates revenue for localities to address new needs for services that are created by those developments.
 - Conditional Rezoning came about because you cannot always create blocks of uses and then put them next to each other. If you have a block of industrial, block of commercial next to a block of residential, that doesn't fully address the ability to deal with land use challenges. Conditional rezoning is a way to address, in the context of a developer, offering conditions that would limit what they can do to make the governing body comfortable with that zoning determination.
 - There are different aspects of the Virginia code that apply to different jurisdictions relating to cash proffers, depending on the form of government and population growth that locality has experienced. However, they have many common elements, including that conditional rezoning must be voluntary, must be consistent with the comprehensive plan, and must be reasonable related to the rezoning.
 - The rise of cash proffers has been developing since the 1970's; Chesterfield County adopted the first Proffer Policy in 1990.

DELEGATE DANIEL W. MARSHALL, III
DELEGATE DAVID L. BULOVA
DELEGATE ROSALYN R. DANCE
DELEGATE BARRY D. KNIGHT
DELEGATE CHRISTOPHER K. PEACE

SENATOR MAMIE E. LOCKE
SENATOR JOHN C. WATKINS
SENATOR GEORGE L. BARKER

MARK K. FLYNN
LAURA D. LAFAYETTE
T.K. SOMANATH

- Cash proffers were an arrangement accepted by developers because they thought they could make an “offer they could not refuse.” It was an ability to offset the perceived externalities created by rezoning. In recent years there have been voices on the development side that have spoken out against this process, through legislation and the courts. This issue of cash proffers has been heavily litigated in Virginia. It is a process that has been upheld by courts, as they are reluctant to get in a position of local legislative body.
- Regarding the Forest Ridge Project proposed in Chesterfield County, in 2006 there was rezoning of 22 acres. At the time, they received approval for 48 dwelling units on the property with cash proffers. In 2008 a new developer (Viridis) acquired the property; and in 2012 they asked for changes to increase the density and eliminate the maximum cash proffer contribution.
- With Maximum Cash Proffers, the County calculated a potential maximum cash proffer payment based on the impact of a single dwelling unit on new road, school, public safety and recreation infrastructure. With In-Kind Proffers the County may accept land dedication or the developer’s construction of some public facilities. If accepted, the County may consider credit against the maximum cash payment, and credit is equal to the cost of the public facility construction.
- Within the proffer policy, the county is divided into service districts. They divide specific categories of capital improvements into six categories. Three are also considered countywide: parks, libraries, and fire stations. The other three are schools, parks, and roads.
- **Lloyd:** In the Forest Ridge Project, the initial 2006 zoning case imposed maximum cash proffers, but received credit for cost of off-site storm drainage improvements to be constructed by the project owner. In 2012, in exchange for request to increase density & eliminate proffers, Viridis offered 1) to fund construction of an off-site right hand turn lane on Courthouse Road (arterial highway), and 2) amended plans for off-site storm drainage but still on the hook to fund construction.
 - Staff approved the increase in density, accepted the offer to construct turn lane, denied the request to eliminate the cash proffers and did not address consideration of credit for cost of in-kind proffers against maximum cash proffer amount. The Planning Commission approved Viridis’ requests, including eliminating cash proffers. The Board of Supervisors ultimately denied the amendment due to refusal to pay maximum proffers.
 - This raises an issue on the proffer system, and whether there is voluntariness and the relationship of what is offered and the impact on county services. There is also a judicial challenge, with technical legal issues in connection to the case. The developer in Chesterfield raises four claims in their suit against the county: 1) Violates the 5th Amendments (Takings Clause), 2) violates 14th Amendments (Equal Protection), 3) denial is *Ultra Vires*, 4) violates Va. Equal Protection Clause.

- **Senator Barker:** Where is this in the judicial process now? What is the path to final resolution?
 - **Lloyd:** This initial complaint has been filed in Federal Court. I would expect some additional pleadings filed related to summary judgment motion. We are at least a year or so away from resolution on this particular case
- **Barker:** If the appellants prevail in this case, may that have a “chilling” effect on other jurisdiction’s willingness to amend comprehensive plans that would permit considerations of such rezoning?
 - **Lloyd:** All jurisdictions that use cash proffers will certainly be watching this case closely. If cash proffers are illuminated, it will require a whole new approach. That is very unlikely as some jurisdictions rely on cash proffers heavily to fund capital needs. There will be opportunities to revise cash proffers if the court does not totally invalidate the entire system.
- **Barker:** My concern is that the reaction of localities may be to amend the comprehensive plan in ways that will not even allow the consideration of such rezoning.
 - **Lloyd:** That could be an issue, and it is unclear how this could be resolved.
- **Delegate Bulova:** There seems to be two solutions to this. One is for the courts to approve the request of the developer. The second is to ask the locality to reset the cash proffer process and move forward with a different set of assumptions for what a cash proffer is. What direction do you think the solution will go?
 - **Lloyd:** I cannot predict what the solution will be. The basis for relief is outlined in a new section of Virginia Code (section 15.202208.1) from the last legislative session. Any time there is an unconstitutional condition associated with the zoning case, the applicant would be entitled to a award of compensatory damages and to an order remanding the matter to the locality. Short of the entire proffer system being thrown out, which is unlikely, I see localities that have limited the scope of what is used as major funding source for all sorts of capital improvements.
- **Delegate Dance:** As this is already a piece of litigation moving forward, are you just providing us information, and are not expecting any action from the Housing Commission?
 - **Lloyd:** Yes, that is correct.
- **Mark Flynn, Governor Appointee:** You mentioned a new piece of code from last session (Va. Code § 15.2-2208.1). That section creates a state court action, correct?
 - **Lloyd:** Correct.
- **Flynn:** And this case is filed under Federal District Court?
 - **Lloyd:** Correct
- **Flynn:** So will it be under the normal juris prudence of the Federal Court?

- **Lloyd:** The Federal Court will address the federal claims and will use this remedy as the basis for its ultimate outcome.
- **Flynn:** Regarding the Forest Ridge Project and its rezoning, did the original developer complain about the proffers?
 - **Lloyd:** I'm not sure if they did, although I'm sure they would have preferred to not pay the amount. There are those developers assume that is the price of doing business, and are willing to pay.
- **Flynn:** Regarding the section of Code on relief (Va. Code § 15.2-2208.1), if the applicant agrees to conditions, then he estopped from filing a claim under that section. Any thought on that under Nolan /Dolan/ Koontz?
 - **Lloyd:** In this case, the applicant refused to pay something the Board wanted them to pay, and, thus the Board refused their application. At that point, using Koontz, and use that to say it was an unconstitutional request.
- **Flynn:** Regarding the proffers, the plaintiff has claimed that there is still unused capacity in the school system. For counties, I believe the school capacity is the greatest financial issue. The alternative argument would be that the last families that move in have to pay the \$100,000 a piece. Wouldn't there be a problem with that formula?
 - **Lloyd:** It is a challenging policy position: how to fund improvements in a fair and equitable way.
- **T.K. Somanath, Governor Appointee:** Are cash proffers applicable for only residential and not industrial areas?
 - **Lloyd:** That's correct. It is based on dwelling units added. When you add a new commercial project, it will be a net revenue generator for most counties. It will create tax revenue that will support services used by the residents. In my experience, cash proffers are only geared towards residential units.

III. Recurrent Flooding and Housing Issues

- **Locke:** Jim Redick, of Norfolk Emergency Preparedness and Response, could not make it today; and in his absence, we have an audio-video presentation to cover the topic of recurrent flooding.
- **Jim Redick, Norfolk Emergency Preparedness and Response:** Using existing plans and initiatives, Recurrent Flooding Sup-Panel has developed a document inclusive of all these efforts. There are over twenty actionable recommendations. The most significant recommendation is of an Incident Command System that would 1) establish a "resilience coordinator" and 2) establish a 4-Year Action Plan Cycle.
 - With this action plan, we propose and initial acceptance of 1.5 feet for incorporating sea-level rise into planning, and that is with caution. This is the number recommended by VIMS in their 2012 report.

- Caution association with the 1.5 feet sea level rise includes the following. It is a minimum number only. It represents sea level rise for inundation only, and does not take into account storm impact. Lifespan of a project must be considered; as with a longer lifespan, a more aggressive number should be considered.
- Unity effort is the theme of this paper, and working together will help us successfully adapt to this threat.
- **Elizabeth Palen**, *Executive Direction, Virginia Housing Commission*: Last week in Jim Redick's full report there were two issues: 1) Real estate disclosures of houses that had previously flooded and 2) whether the state or each locality should determine which level building should be built relative to sea level.
- **Locke**: Even though there are a number of Hampton Road localities involved, this is not an issue that just affects Hampton Roads. Recurrent flooding is an issue across the state.
- **Barker**: Can you explain the chart in Redick's presentation? (Redick's presentation is available under "materials")
 - **Locke**: They represent estimations made by previous studies.
- **Barker**: The chart then suggests that the projection of severity has increased over time as more data has become available. Perhaps then 1.5 feet is too modest an estimation, and we may run out of time.
- **Locke**: The Study Commission agrees we do not have much time to address these issues.
- **Bulova**: Is there a time frame regarding the 1.5 feet just to get us started with an expectation that we would use a higher number in the future?
 - **Locke**: The Study Commission has two years to issue recommendations. VIMS did have some recommendation; however, we are running out of time to put a plan in place to implement those recommendations
- **Flynn**: The 1.5 feet is only the average sea level rise, and does not include storm surges. This is only part of the story.

IV. Work Group Updates

- **Common Interest Communities**
 - **Bulova**: Our first meeting will be on October 15, where we will discuss three issues: 1) CIC Bill of Rights (HB 322; Greason, 2014), 2) Non Judicial Foreclosures, and 3) Discussion of Homeowner's Association results.
- **Affordable Housing and Real Estate Law**
 - **Delegate Marshall**: On many work sites, there are people who do not necessarily speak English. Thus, they are not informed of asbestos issues from signage on site. We then asked the Asbestos Sub Work Group to address the issue.
 - **Palen**: The Asbestos Sub Work Group meeting in July brought forth three recommendations: 1) The Department of Housing and Community

Development (DHCD) will ask the Virginia Building Code Academy include a training module that includes awareness and review of asbestos as part of training.

- 2) Virginia Department of Labor and Industry was asked to make more conspicuous and user-friendly signs, possibly in other languages, too.
 - 3) Contractors who were not being reputable and were reforming under another LLC.
- **Trisha Henshaw, Virginia Board for Asbestos, Lead and Home Inspectors:** The Asbestos Board discussed adding a regulatory amendment to incorporate language related to substantial identity. The Board decided that adding that language would be redundant because the first step to becoming a contractor is to go through the board for Contractors, where they would have already been evaluated pursuant to that substantial identity language.
- **Palen:** The consensus at the Sub Workgroup meeting was that problems were not with licensed asbestos contractors, but with regular contractors using day laborers.
- **Locke:** Were there specific recommendations?
 - **Palen:** One recommendation was to send a letter to DHCD suggesting they add some language to include the training modules regarding asbestos for the Virginia Building Code Academy. If we agree we can add that in a letter to them asking to put that forth.
- **It was moved and seconded that a letter be sent to DHCD as outlined.**
- **The motion passed.**
 - **Palen:** We may also want to send a letter to the Virginia Department of Labor and Industry asking them to make their signage more conspicuous. The Sub Workgroup was not in agreement as to whether the signs should be bilingual. That was the recommendation of the Sub Workgroup.
- **It was moved and seconded to send a letter to the Virginia Department of Labor and Industry.**
- **The motion passed.**
 - **Barker:** There was concern for people living in manufactured housing where was lack of adequate protection against frequent, unnecessary inspections from the property owner. I am working with representatives from the manufactured housing community to come up with a proposal to bring to the next meeting.
 - **Marshall:** We have a final meeting in November to take up the final two issues.
- **Housing and Environmental Issues**
 - **Palen:** We discussed two issues. The first had to do with building codes and insurance issues where the Building Code Official was not able to go up in

the bucket with the owner of the signage company because the owner's insurance did not cover the Building Code Official. With current practices, the Building Code Officials use the equipment on the job site. We met with the parties the issue seems to have been resolved by switching insurance carriers.

- **Bulova:** The second issue dealt with property assessed clean energy programs. The current legislation allows for Public-Private Partnerships with local government components that front-end fund the capital needed to energy efficiency improvements on property, which is then paid for slowly based on your property assessments. The problem is that it is never really used. Our existing program is not working, so we are looking into a solution. In a month or so we may have a draft bill to present.

V. Public Comment

- **Senator Locke** asked for any public comment.

VI. Adjourn

- Upon hearing no request to comment, **Senator Locke** adjourned the meeting at 3:20 PM.